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NTSB Order No. EA-4666

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of May, 1998

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14844
v.)	
)	
ARNOLD N. DEARY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered after an evidentiary hearing held on August 14, 1997.¹ By that decision, the law judge affirmed the Administrator's order suspending respondent's commercial airman certificate for

¹ An excerpt from the hearing transcript containing the law judge's initial decision is attached.

violating sections 91.7(a) and (b), and 91.13(a), 14 CFR Part 91, of the Federal Aviation Regulations.² We deny the appeal.

The Administrator's order of suspension stems from respondent's operation of N89562, a Cessna Model 310G, on July 30, 1996, from Marshfield Municipal Airport ("Marshfield"), Massachusetts, and alleges that the aircraft's right engine was not operating properly. Several witnesses, all of whom were either pilots or aircraft mechanics, testified at the hearing that because of apparent asymmetric thrust, respondent experienced controllability problems that caused him to abort two takeoffs. On the first takeoff attempt, respondent's aircraft was seen veering to the right and a power reduction was heard as the aircraft's takeoff roll was straightened, but as power was reapplied the aircraft again began drifting to the right.

² FAR §§ 91.7 and 91.13 provide, in relevant part, as follows:

§ 91.7 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

Respondent aborted the takeoff, exited the runway and taxied back for a second takeoff attempt. Essentially the same thing happened during the second takeoff attempt, and again the takeoff was aborted.

Respondent testified that during the first aborted takeoff he initially thought the aircraft had a "caught" nose wheel, but after the abort he felt that the problem might be a differential brake problem. He testified that he tested the brakes and, finding nothing wrong, he elected to attempt another takeoff. Respondent also testified that, after the second aborted takeoff, he thought that "maybe I've got some fouled plugs or something," and that he therefore ran the engines at 2,000 RPM with the fuel mixture leaned in order to burn off any accumulated carbon. He testified that both engines' instruments indicated nothing abnormal during this runup, and that he therefore decided to "try it one more time."

Respondent managed to take off on his third attempt.³ Respondent testified that the aircraft "was going straight, [and] everything was in the green," but several of the Administrator's witnesses testified that it sounded as if this takeoff was not

³ After departing Marshfield, respondent picked up two passengers at another airport and flew them to Nantucket for a pleasure trip. The same witnesses who observed respondent's takeoff also observed his arrival back at Marshfield. One of the Administrator's witnesses observed the right engine fail as respondent reduced power in the landing flare, and two other witnesses observed respondent trying to taxi with the right engine inoperative. Respondent testified that after landing he purposely shut down the right engine to see if he could taxi with only one engine operating.

performed with full-power, and they also testified that the aircraft's climb performance was less than what they would have expected. At least one witness also testified that a large amount of left rudder input was observed throughout the takeoff.

A subsequent investigation by the Federal Aviation Administration ("FAA") led to the discovery that a fuel pump was not performing properly, causing erratic fuel flow to the right engine of respondent's aircraft. Respondent argues, however, that his actions were proper, and that he thought his runup had solved any problems and, in any event, he could not have known that there was a problem with the fuel pump. We need not address these arguments, however, because, to the extent there is considerable conflict between respondent's testimony and that of the other witnesses regarding the third takeoff attempt, we defer to the credibility determinations made by the law judge. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (including cases cited therein). The law judge found that respondent knowingly took off "with a malfunctioning right engine."⁴

⁴ We also note that Lieutenant Robert Wright of the Marshfield Police Department, who investigated respondent's complaint that someone had put water in his aircraft's fuel system, testified that respondent told him that his right engine was not running at its best when he took off. (Fuel samples taken from respondent's aircraft and sent to the police lab tested negative for contamination.) And, when testifying about his takeoff, respondent said:

And so [on climb-out,] I turned off out over the marsh. This is a safety precaution, because I didn't want to go out over the houses. So I figured, if anything's going to happen, I'll go into the marsh.

(continued . . .)

We think the record supports the law judge's finding that respondent violated §§ 91.7(a) and (b), and 91.13(a).⁵ The aircraft was unairworthy, but respondent nonetheless took off anyway.⁶ It is also well settled that "a violation of an operational FAR provision . . . is sufficient to support a 'residual' [section 91.13(a)] violation." Administrator v. Thompson, 7 NTSB 714, 716 at note 7 (1991); see, e.g., Administrator v. Vogt, NTSB Order No. EA-4143 at 11 (1994). Respondent also argues that his sanction is excessive, but he fails to demonstrate how that is the case when a 180-day suspension is consistent with both precedent and the

(continued . . .)

Transcript at 261.

⁵ We have no doubt that the aircraft was unairworthy when respondent made the takeoff at issue, for the record indicates that the right engine was not performing properly, and that this was caused by the malfunctioning fuel pump. We note, however, that the law judge did not have to find that respondent actually knew of the aircraft's unairworthy status in order to uphold the violation. See Administrator v. Parker, 3 NTSB 2997 (1980) (a violation can be based upon a finding that a pilot should have known that an aircraft was unairworthy).

⁶ Respondent's argument that he should have been allowed to rely on the fact that the aircraft had just undergone an annual inspection as an assurance that the aircraft was airworthy is misplaced. Respondent was obviously aware that something was amiss after having had to abort two takeoffs. Moreover, even if respondent's uncredited claim that the right engine performed normally during the third takeoff attempt is true, the record still indicates that a malfunctioning fuel pump causing erratic fuel flows caused the right engine to operate poorly, at least some of the time, and such sporadic performance would render an aircraft unairworthy regardless of whether the engine was functioning normally at a given moment.

Administrator's Sanction Guidance Table.⁷

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 180-day suspension of respondent's airman certificate shall commence 30 days after the service date of this opinion and order.⁸

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁷ It is irrelevant that a special flight permit ("ferry permit") was issued for further inspection and maintenance after the takeoff at issue. Even though the FAA inspection that preceded the issuance of the ferry permit failed to discover what was wrong with the right engine, issuance of a ferry permit is not an indication that an aircraft is airworthy.

⁸ For the purposes of this order, respondent must physically surrender his airman certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).